GENERAL AIR FORCE COUNSEL

FRAUD FACTS

DEPUTY GENERAL COUNSEL (ACQUISITION) *No. 5, April 1998*

This is the fifth edition of ***FRAUD FACTS***, a biannual newsletter from the Air Force Deputy General Counsel (Acquisition) (SAF/GCQ).

The purpose of the newsletter is to provide information and feedback to Acquisition Fraud Counsel (AFCs) at all levels concerning the ongoing operation of the Air Force's Procurement Fraud Remedies Program.

SMART PARTNERING & FRAUD

On February 11, 1998, Brigadier General Francis Taylor, Commander of OSI, and Brigadier General Frank Anderson, Jr., Deputy Assistant Secretary (Contracting), Assistant Secretary (Acquisition) emphasized "Smart Partnering in Detecting and Preventing Contract Fraud" in a joint letter to AFOSI agents and contracting activities.

The letter recognizes that "an AFOSI/Contracting partnering effort will go a long way toward stopping procurement fraud and ultimately save the Air Force's scarce resources." Suggestions to improve the working relationships between the two organizations at the local level included keeping each other informed of actions that may affect the other.

The letter also reminded both AFOSI and the contracting community of the role of acquisition fraud counsel (AFC) in pursuing contract fraud and encouraged them to keep AFCs informed. SAF/GCQ urges all AFCs to be a full part of this "smart partnering" effort. When AFCs develop a good relationship with both AFOSI and contracting, the AFC can be a vital link in helping the parties work together toward a common goal -- fighting fraud (the full text of this letter can be found on the Internet at http://www.safaq.hq.af.mil/contracting/mgmt_info/fraud1.html).

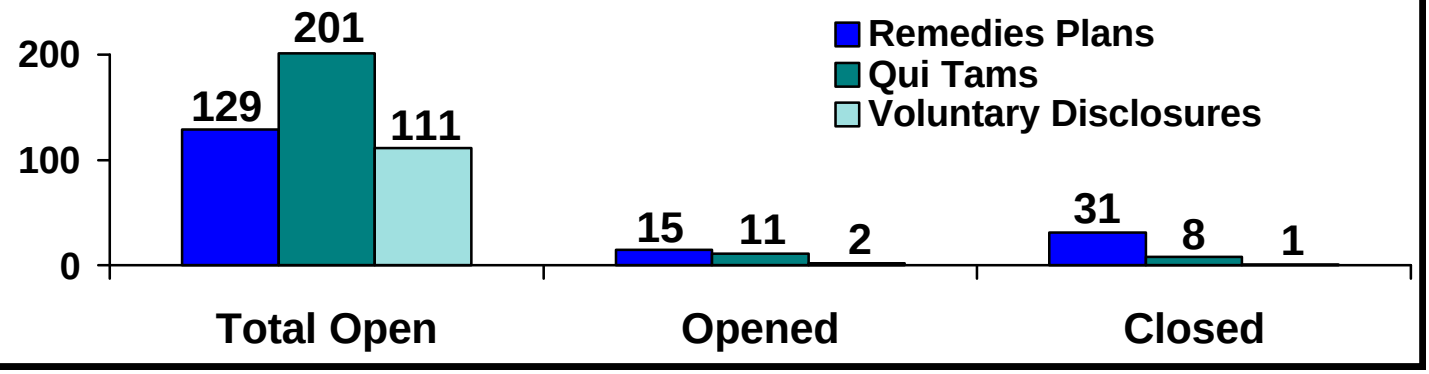
TALKING TEAMWORK: OSI, CONTRACTING, AND AFCs

On May 15, 1998, AFOSI agents from Region 3 and contracting personnel and Acquisition Fraud Counsel (AFC) from the 21st Air Force and the 15th Air Force came together at Scott AFB to talk about how they can work better to fight fraud. Speakers included Air Force lawyers, contracting officers, and AFOSI agents, from the local, MAJCOM, numbered Air Force, and headquarters levels, as well as criminal and civil attorneys from the local United States Attorney's Office.

After a welcome by Col. David Frazelle, AFOSI Region 3/CC, Col. Jay Cohen, 21 AF/JA, and Col. David Thomas, 15 AF/JA, Dough Thomas of HQ AFOSI spoke about AFOSI's fraud mission and

Air Force Procurement Fraud Cases

(October 1997 through March 1998)



emphasized that defeating and deterring acquisition fraud is one of the four AFOSI command priorities. Maj. Bud Campbell, the contracting officer assigned to HQ AFOSI, discussed fraud in contracting and suggested ways contracting personnel and AFOSI agents can work together in pursuing fraud matters to the alleviate concerns of each group. Kathy Burke from SAF/GCQ gave an overview of how the Air Force Remedies Program, described in AFI 51-1101, works in practice.

Local Assistant United States Attorneys lent their expertise to the discussions of relationships with DoJ and gathering evidence. Maj. Lisa Daniel, deputy SJA at MacDill AFB, gave good advice when she reminded participants to look at the terms of the contract when pursuing allegations of procurement fraud. Lt. Col. Don Flynn of AFOSI/JA spoke about getting money back to the Air Force. He described how civil fraud recoveries can be returned to the Air Force in some instances and also suggested that those working on procurement fraud matters look for alternatives to monetary recoveries when attempting to resolve procurement fraud cases.

Participants in the one-day conference received a good overview of issues involved in the pursuit of procurement fraud cases, but it was only a start. The conversations between AFCs, AFOSI agents, and contracting officers will continue as they return to their bases and try to develop better ways to work together to pursue contract fraud.

QT PROVISIONS UNCONSTITUTIONAL?

Yes, rules the Houston division of the U.S. District Court for the Southern District of Texas, concluding that Congress can not legislatively confer Article III standing upon a False Claims Act qui tam relator who has suffered no cognizable injury. This anomalous decision, US ex rel. Riley v. St. Luke's Episcopal Hospital, 982 F. Supp. 1261 (S.D.Tex. October 21, 1997), marks the only time that a court has found the qui tam provisions of the False Claims Act unconstitutional.

The court held that the relator, in a case in which the Government declined to intervene, failed to meet Article III's standing requirement for three reasons: (1) there was no injury-in-fact to the relator, (2) an injury can not be created via the by-products of litigation (the relator's share of a recovery), and (3) Congress can not assign the Executive's right to pursue litigation on behalf of the United States.

Two months later, the Galveston division in the same district rejected Riley. Hopkins v. Actions, Inc., 985 F.Supp. 706 (S.D. Tex. 1997); *accord*, US ex rel. Roby v. Boeing, U.S. Dist. LEXIS 1939 (S.D. Ohio, Feb. 10, 1998). These courts found the holding in Riley unpersuasive and rejected defendants' arguments that the qui tam provisions are unconstitutional.

BURDEN OF PROOF: CIVIL FRAUD

When analyzing the evidence to pursue remedies for a civil fraud case, you must keep in mind the appropriate standard of proof. The standard of proof varies and is prescribed either by statute or case law. Under the False Claims Act, the standard of proof is defined as preponderance of the evidence (31 U.S.C. § 3731(c)). However, the Special Plea in Fraud statute, 28 U.S.C. § 2514, does not prescribe a standard, and case law calls for a clear-and-convincing standard.

Apart from statutory remedies, the Court of Federal Claims has held that the Government must prove a contractor's fraud by a preponderance of evidence in order to revoke acceptance of goods under the Inspection clause in government contracts. BMY v. United States, 38 Fed. Cl. 109 (1997). Yet, the ASBCA has held that when the Government asserts the affirmative defense to a contractor's claim that the contract was tainted by fraud and was void ab initio, the Government must prove that defense by clear and convincing evidence. Appeal of Danac, 92-1 B.C.A. ¶ 24,519 (1991).

DEBARMENT: TOTAL CIRCUMSTANCES

By Steve Shaw, Air Force Deputy General Counsel (Contractor Responsibility)

A government contractor can be debarred for fraud committed in connection with obtaining or performing a government contract. As my daughter would say, "Duh." Everyone in our business knows that.

What may be less obvious is that a contractor can and, in my view, should be considered for debarment for a much broader range of misconduct. Government contract fraud is merely the tip of the iceberg. Consider the following conduct—none of which require an indictment, conviction or civil judgment in order to support a debarment action:

•Fraud unrelated to government contracts;

•Non-fraud criminal offenses such as theft, forgery, bribery, falsification of records, tax evasion and receiving stolen property;

•Any other crime indicating lack of business integrity;

•Failure to satisfactorily perform a government contract; or

•"Any other serious cause."

In short, a contractor can be debarred for any conduct that would bring into question his or her ability to perform either honestly or competently, regardless of whether that conduct itself had anything to do with a government contract.

A case in point. Last year we suspended, and later debarred, Silver State Disposal Services, Inc. (a Las Vegas trash hauler) and seven of its directors and officers. They had been indicted for tax evasion and submitting false rate increase applications to the state of Nevada. The misconduct did not involve an Air Force contract. Silver State Disposal was, however, a government contractor as it hauled the trash for Nellis AFB. Silver State Disposal was found to lack present responsibility not because of its conduct on a government contract, but, rather, because its conduct evidenced its dishonesty.

In analyzing a potential debarment action, the totality of a contractor's conduct should be considered—not merely the conduct which occurred in connection with an Air Force contract.

LEARN ALL ABOUT FRAUD

The Army's Judge Advocate General School (TJAGSA) in Charlottesville, VA is holding its Third Procurement Fraud Course from September 9 through 11, 1998. The course provides basic instruction on the legal and practical aspects of developing a procurement fraud program at an installation. Course material focuses on advising contracting and investigatory personnel on procurement fraud matters as well as the proper and timely referral of procurement fraud matters to appropriate agencies. Instruction covers identification of procurement fraud indicators, fraud statutes, fraud investigation procedures, Department of Defense criminal jurisdiction, debarment and suspension, and the coordination of remedies. Contact AF/JAX at DSN 224-3021 or TJAGSA at 1-800-552-3978 to find out about registration.

RELATOR WINS LARGE RECOVERY!

Whatever happens to those qui tam cases in which the Government declines to intervene? Usually, recoveries are fairly small, and that result has led some commentators to suggest that qui tam cases should be dismissed if the Government does not intervene. But at least one relator has been very successful where the Government declined to intervene. On April 14, 1998, the jury impaneled in U.S. ex rel. Boisvert v. FMC Corporation returned a verdict for the plaintiffs of $125 million in single damages. This number is subject to doubling or trebling, depending on when the conduct at issue occurred. Conceivably, the judgment could top the current record for an FCA recovery—a settlement for $325 million in a health care case. The Boisvert action concerned the production of the Army's Bradley Fighting Vehicle and its amphibious capability. Because the Government declined to intervene, the relator will now receive up to 30% of the judgment amount. 31 U.S.C. § 3730(d)(2).

DOUBLE JEOPARDY DÉJÀ VU

Just when we had Double Jeopardy all figured out (see ***FRAUD FACTS***, October 1997), the Supreme Court decided to change the rules. In Hudson v. United States, 118 S. Ct. 488 (1997), the Court disavowed United States v. Halper, 490 U.S. 435 (1989) ("We believe Halper's deviation from longstanding double jeopardy principles was ill considered") and simplified the inquiry whether a

civil remedy was "criminal" for double jeopardy purposes.

The Supreme Court in Halper ruled that the civil penalties assessed under the False Claims Act for numerous false billings were so disproportionate to the actual damages as to constitute punishment and violated the Double Jeopardy clause. (Halper was previously convicted for the false billings.)

Now, when examining whether a particular punishment is criminal or civil, the initial focus is a matter of statutory construction. Even if the legislature has intended a civil penalty, courts must further inquire whether the statutory scheme was so punitive either in purpose or effect as to constitute a criminal punishment. This latter inquiry is conducted by applying seven enumerated factors, such as whether its operation will promote the traditional aims of punishment—retribution and deterrence. Halper bypassed the threshold question whether the successive punishment at issue was a "criminal" punishment and then elevated the "deterrence" factor to a dispositive status.

We'll have to watch to see how courts will apply the Hudson analysis to Double Jeopardy claims involving the False Claims Act.

REMEDIES OBTAINED

The following are recent remedies obtained in Air Force procurement fraud cases:

US ex rel Pratt v. Alliant Tech Systems. On March 30, 1998, Alliant settled a False Claims Act qui tam lawsuit for $4.5 million. The Department of Justice intervened in the relator's July 20, 1995 lawsuit, following an investigation into the relator's allegations of labor cost mischarging by Alliant in its Department of Defense subcontracts with McDonnell Douglas. Affected programs included the Delta II, Peacekeeper, Pershing II, Poseidon, Titan, Trident, and Polaris missiles.

US ex rel. Oberman v. McDonnell Douglas. On November 19, 1997, McDonnell settled a False Claims Act qui tam lawsuit with the Department of Justice for $2 million. The case began in November 1991 when the relator filed a complaint charging the McDonnell had paid various vendors for defective tooling, reworked the defective tooling, and then charged both types of costs to the Air Force under the C-17 program.

Sand Corporation of Manns Harbor. On July 10, 1997, Harry Mann, Range Manager at Dare Bomb Range, agreed to settle a civil lawsuit with the United States for $75,000. The settlement came after the completion of a joint DCIS/AFOSI investigation into whether Mann provided Sand, a company in which Mann and his family had a financial interest, with procurement-sensitive information for USAF and Navy solicitations. On March 23, 1998, SAF/GCR debarred Sand Corporation until February 2, 2001 and has proposed Mann for debarment.

Michael Sprague. Sprague, a USAF Captain stationed at Ramstein AB who managed the upgrade and maintenance of USAFE computers, was convicted at court-martial for influencing the award of a contract, abusing his Government American Express card, and negligently failing to secure classified materials. He was sentenced to a $10,000 fine and dismissed from the AF. Sprague's conviction followed an AFOSI investigation into whether he was a silent partner in Network Data Systems, a subcontractor performing the work that Sprague managed. Sprague, his wife, his company, and his business partners were all debarred by SAF/GCR.

WHO'S WHO @ SAF/GCQ

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